Appendix.

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

CHARLES F. WHITE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petition for Writ of Certiorari Filed March 30, 1978.

Certiorari granted May 30, 1978.

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COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

FRANKLIN COUNTY.

COMMONWEALTH

v.

CHARLES F. WHITE.

Docket Entries.

DOCKET ENTRIES, No. 5697.

1975		
September		
9	(1)	Indictment returned, Lynch, J.
17	(2)	Appearance of Stephen Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J.
25	(3)	Defendant's motion to suppress filed.
October		
1	(4)	Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J.

1975

October

7 (5) Defendant's motion for return of property seized filed.

1976

January

29 (6) Defendant's motion to suppress allowed as to oral statements made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in re motion to suppress evidence entered.

February

4 (7) Defendant's exception to "Findings and Rulings in re motion to suppress evidence filed.

May

20 (8) Defendant's waiver of jury trial and defendant's motion to make proceedings subject to Chapter 278, Sections 33A-33G filed and allowed, Cross, J.

(9) After trial, Court finds the defendant guilty and

(10) Finding of guilty entered, Cross, J.

(11) Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, Section 3(d) filed. (11A) Stipulation regarding disposition of certain evidence filed.

26 Court orders case placed on file, Cross, J. Defendant consents thereto.

1976

June

9 (12) Defendant's claim of appeal filed. (D.A. notified C. 278, S. 33B)

July

1 (13) Defendant's motion to be furnished copy of transcript and (14) motion to stay execution of sentence pending appeal filed.

15 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished copy of transcript allowed, Cross, J. (at Northampton) Motion to stay execution of sentence pending appeal denied, Cross, J.

August

5 (15) Order for transcript of proceedings and evidence entered, Cross, J.

September

10 (16) Appearance of Robert S. Cohen, Esq. for defendant filed.

16 (17) Motion for leave to withdraw filed.

(18) Notice of withdrawal of appearance of Stephen W. Silverman filed.

October

18 Copy of transcript received. (2 copies)

November

16 Summary of the record completed, parties notified.

26 (19) Defendant's designations for the record and (20) Assignment of error filed.

1976
December
3 Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

DOCKET ENTRIES, No. 5698.

1975
September
9 (1) Indictment returned, Lynch, J.
17 Appearance of Stephen W. Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J. (#5697)
25 Defendant's motion to suppress filed. (See #5697)

October
1 Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J. (see #5697)
7 Defendant's motion for return of property seized filed. (see #5697)

1976
January
29 Defendant's motion to suppress allowed as to oral statements made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in Re Motion to Suppress Evidence entered.

February
4 Defendant's exception to "Findings and Rulings in re motion to suppress evidence" filed. (see 5697)

May
20 Defendant's waiver of jury trial and motion to make subject to Chapter 278, Sections 33A-33G filed and allowed, Cross, J.
After trial, Court finds the defendant guilty and (2) Finding of guilty entered, Cross, J.
Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, sec. 3(d) filed.
26 Defendant sentenced to Massachusetts Correctional Institution, Walpole for a term of not more than seven years nor less than five years (credit of seven days awaiting sentencing), Cross, J. Warrant issued.

June
1 (3) Defendant's appeal from sentence to MCI Walpole filed. Copy of indictment and docket entries to

1976

June

1 Appellate Division, Boston; notified Chief Justice McLaughlin and Judge Raymond R. Cross.

9 Defendant's claim of appeal filed.

July

1 Defendant's motion to be furnished copy of transcript and motion to stay execution of sentence pending appeal filed. (5697)

15 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished with copy of transcript allowed, Cross, J. and Motion to stay execution of sentence pending appeal denied. Cross, J. at Northampton.

September

10 Appearance of Robert S. Cohen, Esq. for defendant filed. Motion for leave to withdraw filed.

16 Notice of withdrawal of appearance of Stephen W. Silverman filed.

October

18 Copy of transcript received.

November

16 Summary of the record completed, parties notified.

26 Defendant's designations for the record and Assignment of error filed. (5697)

1976

December

2 (4) Order that the judgment imposing said sentence stand and appeal to Apellate Division re sentence be dismissed entered by the Appellate Division.

3 Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

DOCKET ENTRIES, No. 5699.

1975

September

9 (1) Indictment returned, Lynch, J.

17 Appearance of Stephen W. Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J. (#5697)

25 Defendant's motion to suppress filed. (see #5697)

October

1 Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J. (see 5697)

7 Defendant's motion for return of property seized filed. (see 5697)

1976

January

29 Defendant's motion to suppress allowed as to oral statements made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in Re Motion to Suppress Evidence entered.

February

4 Defendant's exception to "Findings in re motion to suppress evidence" entered.

May

20 Defendant's waiver of jury trial and motion to make subject to Chapter 278, Sec. 33A-33G filed and allowed, Cross, J. After trial, Court finds the defendant guilty and (2) Finding of guilty entered, Cross, J. Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, Sec. 3(d) filed.

26 Defendant sentenced to Massachusetts Correctional Institution, Walpole, for a term of not more than seven years nor less than five years (credit of seven days awaiting sentencing), concurrent with sentence in case No. 5698, Cross, J. Warrant issued.

1976

June

1 (3) Defendant's appeal from sentence to MCI Walpole filed. Copy of indictment and docket entries to Appellate Division, Boston; notified Chief Justice McLaughlin and Judge Raymond R. Cross.

9 Defendant's claim of appeal filed.

July

1 Defendant's motion to be furnished copy of transcript and motion to stay execution of sentence pending appeal filed. (5697)

12 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished with copy of transcript allowed, Cross, J. and motion to stay execution of sentence pending appeal denied, Cross, J. at Northampton.

August

5 Order for transcript of proceedings and evidence entered, Cross, J. (copy to Bertha B. Smith, Stenographer)

September

10 Appearance of Robert S. Cohen, Esq. for defendant filed.

16 Motion for leave to withdraw filed. Notice of withdrawal of appearance of Stephen W. Silverman filed.

1976	
October	
18	Copy of transcript filed.
November	
16	Summary of the record completed, parties notified.
26	Defendant's designations for the record and Assignment of error filed.
December	
2	Order that the judgment imposing said sentence stand and appeal to Appellate Division re sentence be dismissed entered by the Appellate Division.
3	Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

DOCKET ENTRIES, No. 5700.

1975	
September	
9	(1) Indictment returned, Lynch, J.
17	Appearance of Stephen W. Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J. (#5697)

1975	
September	
25	Defendant's motion to suppress filed. (see #5697)
October	
1	Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J. (see 5697)
7	Defendant's motion for return of property seized filed. (see 5697)
1976	
January	
29	Defendant's motion to suppress allowed as to oral statement made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in re motion to suppress evidence entered.
February	
4	Defendant's claim of exception to "Findings & Rulings in re motion to suppress evidence" entered. (see 5697)
May	
20	Defendant's waiver of jury trial and motion to make subject to Chapter 278, Sections 33A-33G filed and allowed, Cross, J. After trial, Court finds the defendant guilty and (2) Finding of guilty entered, Cross, J.

1975

May

20 Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, Sec. 3(d) filed.

26 Defendant sentenced to Massachusetts Correctional Institution, Walpole, for a term of not more than seven years nor less than five years (credit of 7 days awaiting sentencing), concurrent with sentence in case No. 5698, Cross, J. Warrant issued.

June

1 (3) Defendant's appeal from sentence to MCI Walpole filed. Copy of indictment and docket entries to Appellate Division, Boston; notified Chief Justice McLaughlin and Judge Raymond R. Cross.

9 Defendant's claim of appeal filed.

July

1 Defendant's motion to be furnished copy of transcript and motion to stay execution of sentence pending appeal filed. (5697)

12 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished with copy of transcript allowed, Cross, J. and motion to stay execu-

1976

July

22 tion of sentence pending appeal denied, Cross, J., at Northampton.

September

16 Motion for leave to withdraw and notice of withdrawal of appearance of Stephen W. Silverman filed; Appearance of Robert S. Cohen, Esq. for defendant filed.

October

18 Copy of transcript filed.

November

16 Summary of record completed, parties notified.

1976

November

26 Defendant's designations for the record and Assignment of error filed. (5697)

December

2 (4) Order that the judgment imposing sentence of not more than seven years nor less than five years to MCI, Walpole be amended to not more than five years nor less than four years entered by the Appellate Division of the Superior Court for the review of sentences.

3 Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY.

[Title omitted in printing.]

Indictment No. 5697.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: Marijuana as described in Class D of section 31 of Chapter 94C of the General Laws.

A TRUE BILL

JOHN M. FINN,
Assistant District Attorney,

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY.

[Title omitted in printing.]

Indictment No. 5698.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the Transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: Cocaine as described in Class B of section 31 of Chapter 94C of the General Laws.

A TRUE BILL.

JOHN M. FINN,
Assistant District Attorney.

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

Franklin County.

[Title omitted in printing.]

Indictment No. 5699.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: Amphetamines as described in Class B of section 31 of Chapter 94C of the General Laws.

A TRUE BILL.

JOHN M. FINN,
Assistant District Attorney.

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY.

[Title omitted in printing.]

Indictment No. 5700.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: LSD (d-Lysergic Acid Diethylamide) as described in Class C of section 31 of Chapter 94C of the General Laws.

A TRUE BILL.

JOHN M. FINN,
Assistant District Attorney.

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Motion to Suppress.

Now comes the defendant and moves that all evidence seized from a 1960 Chevrolet Hardtop, Mass. Reg. No. 2M9926, on or about March 28, 1975, pursuant to a search warrant dated March 28, 1975, issued by the District Court of Franklin, be suppressed for the reason that said search and seizure was illegal and in violation of defendant's right to be secure from an unreasonable search and seizure as guaranteed by the FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, in violation of ARTICLE FOURTEEN of the DECLARATION OF RIGHTS OF THE CONSTITUTION OF MASSACHUSETTS and in violation of the provisions of Massachusetts General Laws, c. 276, Sects. 1-3D as amended. Said search and seizure was illegal for the following reasons:

1. The affidavit in support of the search warrant fails to disclose that the defendant voluntarily and knowingly waived his constitutional privilege against self-incrimination before being questioned by the State Police trooper which interrogation allegedly led to the information upon which the search warrant was sought.

The defendant, CHARLES F. WHITE, moves that all oral or written statements taken from him by the police following his arrest on or about March 28, 1975, be suppressed as in violation of the defendant's right against self-incrimination

as guaranteed by the FIFTH and FOURTEENTH AMENDMENTS to the CONSTITUTION OF THE UNITED STATES and ARTICLE XII of the CONSTITUTION OF MASSACHUSETTS. Said statements were illegal for the following rights [*sic*].

1. The defendant did not knowingly or voluntarily waive his miranda rights.
2. The defendant was not represented by counsel nor did he waive his right to counsel prior to being questioned.

DEFENDANT,

By STEPHEN W. SILVERMAN.

Filed September 25, 1975, and, after hearing, allowed as to oral statements made while in custody, denied as to property seized (Moriarty, J.) January 29, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Affidavit in Support of Motion to Suppress.

I, CHARLES F. WHITE, on oath state that I am the defendant in the above indictments charging violation of the controlled substances act and that I was arrested on or about March 28, 1975 by the Ashfield Police Department

and the Mass. State Police while operating a motor vehicle. Subsequently, I took a breathalyzer test which resulted in a reading of .13. Prior to being searched at the police barracks, I attempted to telephone a lawyer to get advice concerning my arrest. Due to my condition, I was unable to operate the telephone. I was then searched and a small quantity of marijuana was found in my shirt. Following this search, I again attempted without success to use the telephone to contact a lawyer. I never was aware that I waived any constitutional rights and in fact wished to exercise my right to have counsel present during any questioning and to remain silent.

Signed under oath and penalties of perjury.

CHARLES F. WHITE.

Filed October 7, 1975.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Supplemental Affidavit in Support of Motion to Suppress.

I, CHARLES F. WHITE, on oath state that at the time of my arrest on March 28, 1975 I was under the influence of alcohol and also under the influence of drugs and that this

condition continued following my arrest and during the time I was at the police barracks while I was attempting to telephone a lawyer or friend to help me contact a lawyer and while I was being questioned by the police relative to the marijuana found in my pocket. My answers to questions led to the issuance of a search warrant which was used to search the trunk of my vehicle which had been towed to the police barracks and wherein the controlled substances shown on the return of the warrant were seized.

Signed under oath and the penalties of perjury this September 29, 1975.

CHARLES F. WHITE.

Filed October 7, 1975.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Hearing on Motion to Suppress
and
Motion for Return of Property.

[4] January 12, 1976

Morning Session

[Court in at 9:30 a.m. Defendant and all counsel present.]

MR. FINN: Your Honor, on Indictments No. 5697 through 5700, the Commonwealth v. Charles F. White, the Commonwealth is ready to proceed on a motion to suppress and a parallel motion for return of property.

THE COURT: Do you have a copy of the motions?

[Mrs. Pekenia hands papers to Court.]

MR. SILVERMAN: There is a motion to suppress, to return property, and two affidavits.

THE COURT: I have a motion to suppress, motion for return of property. There is a supplemental affidavit, one document entitled "Motion for Return of Property" and an affidavit.

MR. SILVERMAN: There are two affidavits going with the motion to suppress.

THE COURT: I have an affidavit and a supplemental affidavit.

MR. SILVERMAN: Yes. I have a short memorandum. I gave a copy of it to the District Attorney. Some of the cases I think might have bearing on this motion.

[Mr. Silverman hands papers to the Court.]

[5] MR. SILVERMAN: There is one witness, a State Trooper, not here yet, but is it all right to go ahead and expect him at 10 o'clock? I understand we do have the Chief here and the defendant is here.

THE COURT: We will proceed with the Chief.

[6] *WALTER D. ZALENSKI, Sworn*

Direct Examination by Mr. Silverman

Q. Will you tell us your name and occupation.

A. Walter Zalenski, Chief of Police, Ashfield.

Q. Were you the Chief of Police in March, 1975?

A. I was.

Q. Chief, on March 28, 1975, did you have occasion to investigate a vehicle in Ashfield?

A. I did.

Q. Can you tell us the circumstances of that.

A. I received a call at approximately 2:00 a.m. in the morning to investigate an automobile accident on Route 116 in South Ashfield. I proceeded to investigate the accident, and there is where I found the accident, and in South Ashfield a car had gone over a bank and hit several posts, and that is where I found the defendant, Charles White, in the car.

Q. Was he alone in the car?

A. He was.

Q. Tell us what you did when you approached the car.

A. I walked up to the car, and he was sitting behind the wheel, trying to get the car out of the embankment, and he asked me — said, "If you give me a push, I think I can make it," but I saw the situation where he couldn't get out of [7] there and I told him. I noticed he was under the influence of something at the time, and I asked him if he would please shut off the motor and come with me. He didn't give me any resistance. I opened the door and walked up to the car with him. I gave him his rights. He answered me in a way he understood what I was talking about, and I proceeded to put him in the cruiser and take him in, and about this time —

Q. Could I stop you for a minute?

A. Yes.

Q. What caused you to conclude he was under the influence of something?

A. Well, his eyes were glassy and his speech was somewhat slurred, and when he walked to the car he staggered.

Q. Would you say he had difficulty standing when he got out of the car?

A. Not necessarily, because he walked up the bank all right. There was sort of an incline and he seemed to climb up that all right.

Q. Did you testify at the probable cause hearing he had trouble standing when he got out of the car?

A. I might have, I can't remember. I might have said he staggered.

Q. Did you notice an odor of any substance?

A. Yes, a very strong odor of an alcoholic beverage.

[8] Q. Sometime did you accompany the defendant to the State Police barracks?

A. I did.

Q. Located where?

A. On Route 2, Shelburne Falls.

Q. In the presence of a State Police cruiser or by yourself?

A. He was in the cruiser alone and the State Trooper followed me, because he had the report of an accident. He was looking for us also and he accompanied me to the barracks.

Q. The defendant in your cruiser?

A. Yes.

Q. And would you tell us what happened at the State Police barracks.

A. We again gave him his rights, Trooper Taliaferro gave him his rights and asked him if he would take a breathalyzer test.

Q. Were you in the defendant's presence when the Trooper gave him his rights?

A. Yes.

Q. Can you give us an indication of what particular rights?

A. The Miranda warning and also gave him the right he had the refusal of the breathalyzer test if he wished, and the [9] procedure that they do give the defendants that are brought in under the influence.

Q. Was one of those rights the right to have a blood test at his own expense?

A. Yes.

Q. Did he say anything to him about a phone call?

A. Yes, he did, and as I remember, he did, he said that he could make a phone call.

Q. And Chief, did the defendant in fact make an effort to make a phone call?

A. Yes.

Q. Did you witness that?

A. I was standing off. The Trooper was standing beside him. I was standing off at a distance, but I was in the room when he was using the pay phone.

Q. Would you tell us what happened.

A. He tried to use the telephone. He had a little bit of a problem to use the phone. As I remember, he did make contact with someone. I heard him mention that roughly, that "I have to get ahold of somebody legally, he will not represent me," or something to that effect; I wasn't that close to him. I heard him make that remark.

Q. What is your opinion, that he was probably talking to a lawyer?

[10] A. Yes.

Q. And did it also appear to you he was not having success getting whoever the individual was to represent him?

A. That is right.

Q. Did he have difficulty in the physical act of making the phone call?

A. Yes, he dropped the money several times and had trouble picking it up, and one time he picked it up and he dropped it on the floor.

Q. Did he make another effort to use the phone while there, as far as you know?

A. Yes, he did, but as I say, I was standing off at this particular time, I can't actually testify as to his reaction to making that call.

Q. To the best of your knowledge, did he succeed in making contact with only the one person you have already mentioned?

A. To my knowledge, yes.

Q. Sometime at State Police barracks was the defendant searched, do you know?

A. Yes, he was.

Q. Was anything unusual uncovered as a result of that search?

A. Yes, what we call a reefer was found on him, a [11] marijuana cigaret.

Q. A single marijuana cigaret?

A. Yes.

Q. Do you know where that was found?

A. In his shirt, in an inside pocket.

Q. Was it the State Trooper that did the search?

A. Yes.

Q. Following the search and the discovery of the cigaret, to your knowledge did the State Trooper have conversation with the defendant regarding the cigaret?

A. He did.

Q. Can you tell us what the conversation was?

A. He was talking to him, and he said, "Do you have any more?" and he said there wasn't anything wrong in having those on him, and he said —

THE COURT: I am sorry, will you repeat that.

THE WITNESS: He said something like he didn't see anything wrong with having one of those on him.

THE COURT: The defendant?

THE WITNESS: Yes, something to that effect, and he asked him, "Do you have any more of these around?" and after a few seconds he said yes, he did, he had some in his car.

Q. Now, as a result of that conversation that the [12] State Trooper had with the defendant and the defendant indicating there was more marijuana in the car, was a search warrant obtained?

A. Yes, there was. We obtained a search warrant that morning at court.

Q. Which court?

A. Greenfield District Court.

Q. That wouldn't be part of the papers here, would it, the application for the search warrant?

[Mr. Finn hands paper to Mr. Silverman.]

Q. Is this the affidavit that was used in applying for the search warrant?

A. The Trooper, you understand —

Q. I understand the Trooper signed the application.

A. I couldn't rightfully testify, but I can testify that is the automobile and the Trooper.

Q. Are the facts in that affidavit as you remember them, as far as the defendant saying he had some marijuana in the vehicle?

A. Yes.

Q. Any question in your mind that is the affidavit used to obtain the search warrant?

A. Is that the affidavit? Yes.

Q. And the search warrant was issued at that time?

[13] A. Yes, it was.

MR. SILVERMAN: I would like to offer the affidavit that is dated March 28, 1975.

THE COURT: The affidavit will be defendant's Exhibit M-#1 and the search warrant will be defendant's Exhibit M-#2.

[*Exhibits M-#1 and M-#2 (Defendant's) in evidence*]

Q. Both of these documents consist of two pages, one containing —

THE COURT: These are copies of the originals?

MR. SILVERMAN: Yes, your Honor.

Q. — and the back of the actual search warrant contains the officer's return showing the items found in the vehicle?

A. Right.

Q. And those are the items that form the basis for the charges pending against the defendant?

A. Yes.

[Court is reading.]

THE COURT: All right.

Q. Going back to the barracks and the defendant, yourself, and the State Trooper, you said the defendant was advised of his rights under the breathalyzer statute. Was a breathalyzer administered?

[14] A. It was.

Q. Do you know the result of the breathalyzer test?

A. It was .13.

Q. And for the record, is it correct that under Massachusetts law anything over .10 raises the presumption one would be under the influence of alcohol?

A. Yes.

Q. Was the breathalyzer administered at about the same time the other events you were describing were taking place?

A. I can't recollect everything that took place last March, but in that same vicinity.

Q. It wasn't several hours later or anything like that?

A. No.

Q. Can you describe the defendant's physical and mental condition, if you can, at the time he was at the State Police barracks?

A. Well, he was — he acted like a person under the influence of alcohol. I mean he was under the weather, he staggered, his eyes were glassy, and he still had the odor of alcohol on his breath, that is all.

Q. Given the breathalyzer of .13, did you have an opinion whether he was under the influence of anything in addition to alcohol?

A. No, I didn't, I couldn't say, because I am not an [15] expert in that field. I couldn't tell, I only had to go by his senses.

Q. Did you participate in the search of the defendant's car?

A. Yes — I didn't participate, I stood by.

Q. You were present?

A. Yes.

Q. Can you tell us where the drugs or the controlled substances that formed the basis for the charges against the defendant were actually found?

A. In the trunk of his car.

Q. In the rear trunk?

A. Yes, the rear trunk of his car.

Q. I assume the search warrant had been issued at the time the search was conducted, is that correct?

A. Yes.

MR. SILVERMAN: No further questions.

[16] *Cross-Examination by Mr. Finn*

Q. With respect to the sequence, can you tell the Court when it was at the barracks the defendant was searched?

A. It was after we had given the breathalyzer test and everything and preparing to take the precautionary measures of putting him in what we call the lockup.

Q. With reference to the telephone call, was that before or after he made the phone calls?

A. I am pretty sure it was before, I wouldn't swear to it.

Q. Now, after the marijuana cigaret was discovered, was it at that time that the conversation took place regarding whether there was any more?

A. Yes.

Q. So you believe that too was before he was attempting to use the telephone, is that correct?

A. I can't remember for sure, but I would say so, yes.

Q. And based on what you have already testified, it was apparent to you, was it not, that the defendant did reach somebody on the telephone?

A. Yes, he did.

Q. And it appeared from what you heard him say it was an attorney?

[17] A. Yes.

Q. Throughout the evening, judging from your conversation, did it appear the defendant had difficulty in understanding you?

A. No, because if I may, your Honor, speak of one thing, when I made the arrest, if I can —

Q. Tell us about that.

A. He was concerned about the vehicle, and I know the dome light was on in the car where he hit the post and it jarred away the door and it wouldn't close, and I remember him saying, "The battery will run down if you don't get the dome light shut off." I remember him saying that, and he remarked again at the barracks or when we were taking him to the barracks about that situation, so I presumed he was knowledgeable of what was going on to my way of considering.

Q. In the course of the search conducted, was money also found?

A. Yes.

Q. Approximately how much?

A. I would say about $3,000.

Q. Where was that?

A. It was in like a strongbox in the truck of the car.

Q. And again with reference to advising the defendant of his rights, this was done on at least two occasions?

[18] A. Three, I think.

Q. And on all of those occasions he indicated he understood those rights?

A. Yes.

Q. And continued to speak with you?

A. Yes.

THE COURT: You say on three occasions?

THE WITNESS: Well, usually the Trooper will give him his rights and give him backup rights to make sure he understood them. I have noticed that the Trooper will give his rights and then again give the rights to make sure he would understand that he had given him his rights. That is the only reason.

THE COURT: Where and when?

THE WITNESS: At the barracks he gave him his rights when he came in the door, and then —

THE COURT: With you?

THE WITNESS: Yes, when he came in, the Trooper gave him his rights again to assure if I had failed —

THE COURT: You had given him his rights at the scene?

THE WITNESS: Yes, I did.

THE COURT: When was the third occasion?

THE WITNESS: When he gave him his rights to [19] receive the breathalyzer test, the type they give for breathalyzer.

THE COURT: How long was that after the time you arrived at the barracks?

THE WITNESS: I would say probably 20 minutes or so.

THE COURT: Will you repeat for me, as best you can remember, substantially — not word for word — what the Trooper said and his tone of voice and the speed at which he said it.

THE WITNESS: You mean his rights?

THE COURT: Yes.

THE WITNESS: He said, "You have a right to remain silent, you have the right to have a lawyer present, anything you say will be held against you in a court of law,

and you have the right to an attorney and have one present while you are being questioned," and then he went on, "You have a right to refuse a breathalyzer test," and told him why — if he refused the breathalyzer test, what would happen to him, and then he told him, "You also have a right to a blood test by a physician or your own physician if you wish, at your own expense."

THE COURT: Did he tell him if he could not [20] afford an attorney, one would be appointed for him?

THE WITNESS: Yes, sir.

THE COURT: How did the defendant respond?

THE WITNESS: He said yes, he understood, and I know he asked about — he even asked, as I recall — he said, "I will lose my license either way, won't I? If I refuse to take it I will lose the license, and if I take it, I will lose the license."

THE COURT: This was with reference to the breathalyzer?

THE WITNESS: Yes.

THE COURT: All right. Anything further, Mr. Finn?

MR. FINN: Yes, your Honor.

Q. (By Mr. Finn) Was there any conversation that you recall, Chief, on the telephone with respect to bail? Did you hear the defendant speaking about bail on the telephone?

A. There was something that he mentioned. As I say, I was away from them, but he asked somebody about "bail out, because they have got all the money, and I don't have any money on me."

MR. FINN: Thank you, that is all.

[21] THE COURT: Mr. Silverman?

MR. SILVERMAN: Yes, your Honor.

[22] *Redirect-Examination by Mr. Silverman*

Q. I think you said you were of the opinion he appeared to understand his rights?

A. Yes.

Q. And that was the right to have an attorney?

A. Yes.

Q. And it appeared for a period of time the defendant was trying to call someone on the phone, and at least the one contact he made appeared to have been with an attorney?

A. Yes.

Q. He appeared to have turned him down, as far as representation?

A. Right.

Q. He didn't say, "I have hired Attorney so-and-so and he will be here and I will put you on the phone"?

A. The Trooper was there and I can't recall if the Trooper spoke to anyone.

Q. You were led to the conclusion this defendant was trying to make contact with an attorney?

A. Right.

Q. And several calls he made unsuccessfully either by failing or dropping the money or not getting any answer?

A. Right, I think that was the problem.

[23] Q. No doubt in your mind while there he was trying to make contact with an attorney?

A. Right.

MR. SILVERMAN: Thank you.

MR. FINN: Nothing further.

THE COURT: That is all?

MR. SILVERMAN: Yes, sir.

THE COURT: You may step down.

MR. SILVERMAN: My other witness will be a State Trooper. I don't think his testimony would be that much longer than the Chief's.

[24] [Court in at 3:25 p.m. Defendant and all counsel present]

FREDERICK TALIAFERRO, Sworn

Direct Examination by Mr. Silverman

Q. Will you please identify yourself for the record.

A. Trooper Fred Taliaferro, Massachusetts State Police, stationed at Shelburne Falls.

Q. Were you a Trooper with the Massachusetts State Police in March, 1975?

A. Yes.

Q. And in that capacity did you have occasion to investigate an automobile incident in conjunction with the Chief of Police of Ashfield?

A. Yes.

Q. And will you tell the Court what you remember, Trooper, as far as your own investigation was concerned.

A. Specifically —

Q. Were you at the scene where the car was stuck?

A. Yes, I was.

Q. Would you tell us what you observed and what you did at the scene.

A. I observed Chief Zalenski and the subject Charles White, now seated before us in the courtroom. Chief Zalenski advised me the subject was under arrest for operating under the influence of alcohol and requested a breathalyzer test.

[25] Q. Did you make observations of the defendant at the scene?

A. No, I did not.

Q. And the defendant went in the same car to the barracks and you followed in your cruiser?

A. I met them there, I did not follow them. I was in my cruiser, and I met them at the barracks.

Q. Did you have conversation with the defendant?

A. Yes, I did.

Q. Would you tell us what conversation you had with the defendant, what if anything you and he did while you were there.

A. Our conversation consisted of advising the defendant of his rights per Miranda, advising the defendant of his rights to a breathalyzer test, and the right to have another test performed at his convenience.

Q. To the best of your knowledge those are the only rights you advised the defendant of in the course of the evening?

A. No.

Q. Any additional rights or different rights you advised him of other than those you have just outlined?

A. No.

Q. While the defendant was at the State Police barracks [26] in your presence, did he attempt to do anything?

A. Yes, he made several phone calls.

Q. And do you have any knowledge as to whether or not he succeeded in completing any of the phone calls?

A. He completed to my knowledge either one or two. One phone call I distinctly remember him saying to the party at the other end, "The reason I called you was someone recommended that I call you."

Q. And did it appear to you in that particular conversation that the defendant might have been talking to a lawyer?

A. Yes, it did.

Q. And what did you hear him say?

A. He said, "I heard you were very good and that is the reason I called you."

Q. Did the defendant say anything to you to indicate he was not able to retain that lawyer at that time or the lawyer was not interested in his case for some reason?

A. I did catch conversation that one lawyer was not able to defend him or did not want to. He stated the lawyer did not want to defend him.

Q. Did the defendant attempt to use the phone on any other occasions?

A. He attempted several times. He reached a party twice and on other occasions I don't think he was successful [27] in completing the calls.

Q. Was there anything unusual about his efforts to use the telephone?

A. No.

Q. Nothing unusual about his efforts to use the telephone?

A. No, he might have had some difficulty with change, which is fairly normal.

Q. And would you say his behavior while using the telephone was normal?

A. Fairly so, yes.

Q. And at some point did you arrange to have the defendant placed in a cell at State Police barracks?

A. Yes.

Q. What condition was he in at that time?

A. Normal condition.

Q. Did you notice anything unusual about his behavior?

A. Yes, he was scratching quite a bit.

Q. Other than that, did you notice anything unusual about him?

A. No.

Q. Anything unusual about the way he was standing, behaving, or moving about?

A. At which time?

[28] Q. Prior to the time you escorted him or arranged to have him placed in a cell.

A. He was sitting when I arranged to have him placed in a cell. We were finished with all business at hand, that is when I placed him in a cell.

Q. Did you administer a breathalyzer test to the defendant?

A. Yes.

Q. What was the reading?

A. .13.

Q. Do you have an opinion as to whether the defendant was under the influence of anything?

A. Yes, alcohol.

Q. Did he appear to be under the influence of anything in addition to alcohol?

A. His scratching seemed abnormal to me at that time. He was constantly scratching himself all over.

Q. Was he doing anything else to indicate to you — strike that. What was he doing that led you to conclude he was under the influence of alcohol other than the breathalyzer results?

A. The breathalyzer results.

Q. You say that was the main thing?

A. Yes.

[29] Q. And other than that and the scratching, nothing unusual about his behavior?

A. No.

Q. Do you have a clear memory of what happened that night?

A. Not perfectly clear, no.

Q. And do you remember testifying in the District Court at the probable cause hearing in this case?

A. Yes.

Q. And this would have been sometime in May, 1975?

A. Yes.

Q. Would you say your memory at that time was a little fresher than it is now about what happened then?

A. No, I was working the 12-hour shift at that time. We had the school problem in Boston and I was working midnight at that time, and we were going anywhere from two to two and a half weeks without a day off. I could possibly have been extremely tired, which might have affected.

Q. You think your memory is as good now about that incident as it was then?

A. Well, possibly different things might have come to mind now that might not have then. I wouldn't comment whether it was sharper or less sharp.

Q. If I said to you the defendant at the time you were [30] with him at the police barracks was in fact bouncing off the walls, would that seem to be something you remember?

A. He might have stumbled somewhat, yes.

Q. You say he might have stumbled somewhat?

A. Yes.

Q. Do you remember him stumbling?

A. Not clearly, no.

Q. What about his conversation with you? Was it incoherent in any way?

A. No, it was not.

Q. You had no trouble conversing with him?

A. None whatsoever.

Q. At some point did you conduct a search of the defendant?

A. Yes, prior to placing him in the cell.

Q. As a result of that search, did you discover some contraband?

A. Yes, I discovered what I believed to be a marijuana cigaret in his breast pocket.

Q. When was this in relation to the phone calls the defendant made?

A. After.

Q. And did you have conversation with the defendant regarding that particular marijuana cigaret?

[31] A. Yes, I advised him again of his rights as I felt he was in possession of narcotics.

Q. And did you ask him anything about the cigaret?

A. Yes, I did. I asked him if he had any other narcotics on his person or in his vehicle or any place, after advising him of his rights.

Q. What did he say?

A. He said he had some in his car.

Q. Did he say anything else about the marijuana as you can recall?

A. Not that I can recall.

Q. Did he say anything else between the time you advised him of his rights on that occasion and the time he said he had more marijuana in his car?

A. Yes, he said he wanted to name some biggies at some point.

Q. He said he wanted to talk to you and give you some names of some biggies? Did he say anything else that you can recall that had relationship to any of the questions you were asking or his rights or the marijuana?

A. No.

Q. Did you at any time make a determination that the defendant was no longer physically able to make telephone calls and should be placed in a cell?

[32] A. No, I determined he should be placed in a cell because the proceedings at that particular time were through.

Q. Nothing to do with his ability or inability to use the telephone?

A. No, sir.

Q. As a result of your conversation with the defendant and his response to your question as to whether he had more marijuana, did you ever obtain a search warrant?

A. I did.

Q. I show you defendant's Exhibits Nos. M-1 and M-2 and ask if those are in fact the affidavit in support of and the search warrant.

A. Yes.

Q. For the record, would you read aloud the short types portion here that begins "March 28, 1975."

A. "March 28, 1975. On March 28, 1975 I assisted Chief Walter Zalenski, Ashfield P D with a subject under arrest for operating under the influence. I gave the prisoner Charles F. White his Miranda rights. I then searched the prisoner and found (1) one marijuana cigaret in the breast pocket of his T shirt color green. I questioned the prisoner regarding the marijuana cigaret. Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

[33] Q. And is that the affidavit you applied for?

A. Yes.

Q. Is that a fair statement of your understanding of the facts at that time?

A. Yes.

MR. SILVERMAN: Your Honor, at this time I have a request. At the probable cause hearing held in District Court in this building there was a tape made of that hearing which is in the Clerk's office at District Court, and

I would like — I don't know what the mechanics would be — would it be possible to have you hear this Trooper's testimony at District Court? I think it has some bearing on the accuracy of his testimony this afternoon. I know it's on a reel on a large machine. It is fairly accessible, because I alerted the Clerk there to the fact and he does have it available. I don't know whether you want to try to get it here or go down there.

THE COURT: We could have the cross-examination now.

MR. FINN: Your Honor, I am not sure.

THE COURT: Do you want to suggest to him what areas would be in conflict?

MR. SILVERMAN: It relates to various portions [34] of the Trooper's testimony, particularly his memory and testimony as to the behavior of the defendant at the State Police barracks. That is the main area.

THE COURT: Are you suggesting there is something inconsistent?

MR. SILVERMAN: Yes, things I think inconsistent and also perhaps because of memory or for some other reason have not been testified to that I think very material.

THE COURT: How big a machine is it?

MR. SILVERMAN: It's a reel-to-reel machine. It's too big for one person to carry, it sits on a table.

MR. MOSELEY: They close at 4 o'clock down there.

MR. SILVERMAN: I don't know what to suggest. I am sorry for the confusion. I suppose it would be better to do it with the Trooper here.

THE COURT: I think without question the Trooper must be here. Is this something the court officers could bring here without a great deal of inconvenience?

[Two court officers leave courtroom.]

THE COURT: Except for that, does that complete the direct examination?

MR. SILVERMAN: Yes, your Honor.

[35] *Cross-Examination by Mr. Finn*

Q. Trooper, after the time you searched the defendant and found the marijuana cigaret, you indicated you advised him of his rights?

A. Yes.

Q. What specifically did you advise him of?

A. I advised him he had the right to remain silent, that anything he said would be and could be used against him in a court of law. I further advised him he had a right to have an attorney present before and during any questioning. If he couldn't afford an attorney, one would be appointed for him. I further advised him if he chose to talk, he might stop at any time. After advising him of these rights I then asked him if he did in fact understand his rights. He stated he did, and I asked if he was willing to talk to me, and he stated he was.

Q. Now, at that time before you asked questions, did you also tell him he was to be charged with possession of marijuana?

A. Yes.

Q. And then you questioned him and he told you there was more marijuana in the car?

A. Yes.

[36] Q. My brother asked you whether or not you recall the defendant bouncing off the walls. You testified that you think he might have stumbled. Do you recall anything else with respect to his manner? Did he wobble walking?

A. During the area of the phone calls there was quite a bit of confusion and movement between the defendant, myself, and other officers involved.

Q. Can you clarify what you mean by "confusion and movement"?

A. He made quite a few trips back and forth from the guard room to the pay phone area which is outside the guard room in the hallway of the barracks.

Q. Did you hear any conversation on the telephone with respect to bail? Did you hear the defendant say anything about bail?

A. I can't recall, other than the fact he did wish to be bailed.

Q. You heard him say that?

A. Yes.

Q. Did you have any difficulty in understanding the defendant?

A. No.

Q. Did he appear to have any difficulty at any time understanding you?

[37] A. No.

MR. FINN: Thank you.

THE COURT: Trooper, at the time — first of all, were he and you at the barracks before he was placed under arrest?

THE WITNESS: He was under arrest the entire time he was there for operating under the influence.

THE COURT: How long before he was placed in a cell?

THE WITNESS: I would say at least an hour, possibly an hour and a half.

THE COURT: Well, up until the time you found the marijuana cigaret?

THE WITNESS: We had to wait 20 minutes for the breathalyzer machine to warm up, then another 10 or 15, maybe 20 minutes in the operation procedure. I would say from 40 to 50 minutes.

THE COURT: What was his condition of sobriety at that time? How would you characterize it?

THE WITNESS: As under the influence of alcohol. I wouldn't say he was absolutely drunk, he was under [38] the influence though.

[Court officers reenter courtroom.]

THE COURT: I am advised the machine is set up all ready to operate in the courtroom downstairs. I think it would be more convenient to adjourn there. [The Court, the witness, the defendant, all counsel, the Clerk, the reporter adjourn to District Court on first floor of same building. Trooper Taliaferro goes to witness stand, Court goes to bench. District Court Clerk is at recording machine. Time 4:05 p.m.]

MR. SILVERMAN: I don't believe the Trooper's testimony is very long. It might be easier rather than jumping around on the tape for the benefit of all of us if he would just start it and let it go.

Dictation from recording in District Court

Q. When did you first see the defendant?

A. I arrived at the scene of a motor vehicle accident on Route 116 in Ashfield and witnessed Chief Zalenski and Charles F. White seated in the yellow corduroy jacket. Chief Zalenski stated the defendant was under arrest for operating under the influence and he was requesting I perform a breathalyzer test so —

Q. (Not audible)

A. No, I did not, I immediately proceeded to the [39] station to get the breathalyzer warmed up in anticipation of the Chief's arrival.

Q. Did you inform the defendant of any rights he might have had?

A. Yes, when the defendant arrived at the barracks I advised him of his rights per Miranda, advised of right to breathalyzer under Chapter 90, Section 24. I further advised of right to a blood test performed by another physi-

cian under 263, 5A, and I also advised the defendant of the penalty for refusing the breath test.

Q. In the course of your duties did you have occasion to search the defendant?

A. Yes, I did, prior to giving the defendant the breathalyzer. The defendant attempted to make several phone calls and we gave him — I gave him the breathalyzer test. Before giving him the test I searched him, said to empty his pockets of money and whatever else he might have had and in his breast pocket was a marijuana cigaret. Upon seeing the cigaret I asked the defendant Charles White what doing with the cigaret and if he had any other.

Q. What was his answer?

A. His answer was, "Yes, I have a lot in my vehicle."

Q. At this time did you know where the vehicle was situated?

[40] A. At this time the vehicle was in the process of being towed from the accident scene to the barracks in Shelburne Falls.

Q. (Inaudible)

A. It most certainly did.

Q. (Inaudible)

A. No, I don't recall the exact time it arrived. It is on record.

Q. Affidavit — search warrant.

A. Yes, I called regarding affidavit for search of the vehicle. He advised he would be available at the court — at which time I went to the court, got an affidavit, signed an affidavit, obtained a search warrant, back to the barracks and in the presence of Chief Zalenski then conducted a search of the vehicle.

Q. What — you found in the car — what they are?

A. In the rear in the trunk of the vehicle situated and scattered throughout the trunk mostly near the bumper end of it I found these two bags of marijuana, plants and marijuana seeds, numerous bags of — this bag containing plastic bags, other paraphernalia, cigaret papers, I also observed a strongbox right here; it was also in the vehicle.

[Colloquy inaudible.]

THE COURT: Skip ahead a little bit.

[41] THE CLERK: How far ahead?

MR. SILVERMAN: Where are you now?

THE CLERK: At 398.

MR. SILVERMAN: Maybe like 415.

A. — this was sent to the lab and marked at the laboratory 4506, was found to contain amphetamines, a class B drug; also the cigaret on the person of Charles White, marked 4504, was examined and found to contain marijuana, a Class D drug.

Q. As a result of this did you —

A. I brought complaint immediately against Charles F. White.

Q. And this morning you seek additional complaint based on the laboratory reports?

A. Yes, I clarified one of these substances as being dextrine.

Q. What was your reason for the charges attempting to distribute?

A. The large amount in his possession plus the paraphernalia, the bags which are used to distribute marijuana.

Q. Thank you. Did you have a conversation with Mr. White regarding the phone calls you say he was trying to make?

A. I accompanied Mr. White [illegible]e phone call.

Q. Did he get hold of an attorney?

[42] A. I did assist in dialing and placing the money. He got hold of an attorney at one time apparently. I

couldn't make out the entire gist of the conversation. Apparently some problems in convincing that attorney to defend him. He did make a statement this attorney was recommended to him by friends of his who had been busted on similar charges.

Q. Was that phone call made at that time after the search of the defendant?

A. I really don't recall; so many attempts, I really don't recall whether this particular one was after, before, or —

Q. Other attempts unsuccessful because Mr. White physically unable to use the phone?

A. In the beginning he was able to some extent. Apparently he tried calling home, tried calling various places. A little later he just was physically — couldn't do anything, he was starting to bounce off the walls. At that point I decided he was through with phone — unable to make them then, I placed in the cell.

Q. — the phone call he had conversation with?

A. I cannot recall.

Q. Was that at the same time?

A. As I placed him in the cell? No, previous to being placed in the cell.

[43] Q. At some point you decided he could not make phone calls?

A. He was proceeding to climb the walls and bounce around and didn't know what he was doing. At this point he was placed in the cell.

Q. Was that after conversation?

A. Definitely after he had conversation with one attorney apparently trying to contact other attorneys.

Q. Can you describe his condition at the time — appeared to be under the influence?

A. Most certainly did appear to be under the influence and some narcotic. His eyes were watery and just —

he didn't have too much control over him. He was scratching all night long and some statements incoherent.

Q. Breathalyzer reading .13?

A. That is correct.

Q. Which is not necessarily enough to make someone bounce off the walls?

A. No, it is not.

Q. Your conclusion he may have been under the influence of something else?

A. I came to that conclusion before the results — the breath test.

Q. Did he appear to have bruises from the accident?

[44] A. No, he didn't.

Q. That is all, thank you.

End of tape recording

MR. SILVERMAN: That is all.

THE COURT: Well, does anybody want to ask any further questions of the Trooper at this time?

Q. (By Mr. Silverman) Any question that was your testimony in the District Court? Was that your voice?

A. No question.

THE COURT: Mr. Finn?

Recross-Examination by Mr. Finn

Q. Trooper, if I remember, the tape would indicate your testimony at that time was you understood you conducted the search before the breathalyzer?

A. As I said before, the sequence of events was kind of confusing. I do remember he was sitting at the table prior to being placed in the cell, so apparently the search did come after the breathalyzer.

Q. Your best memory is it was after the breathalyzer?

A. Yes, because he was seated at the table when he produced the items.

THE COURT: Before or after you placed him in the cell?

[45] THE WITNESS: Before being placed in the cell.

Q. (By Mr. Finn) You say the search was made just prior to placing him the cell?

A. That is correct, he was seated and was talking to us after the phone call. That is when he stated that he had the marijuana in the car and so forth, and, "I want to name some biggies," when I told him he was going to the cell.

Q. I don't recall hearing on that tape any mention there that after you discovered the marijuana cigaret you advised him of his rights again.

A. I might have inadvertently left that out.

Q. You are sure now though that that is in fact what happened?

A. Yes.

Q. After you found the marijuana cigaret you advised him of his rights?

A. Correct.

Q. Why did you do that?

A. Because it was an entirely new ball game. He was under arrest initially for being under the influence of alcohol. The introduction of the marijuana cigaret produced another aspect of it, and I wanted him to be sure although he was under arrest for operating under the influence, he was being further charged with a narcotics violation.

[46] Q. Did all of the efforts with the telephone take place before the breathalyzer test?

A. Again I am not absolutely clear, but I am pretty sure it occurred after.

Q. There was a question asked with respect to whether or not he was able to call, and I believe your answer on the tape was to some extent.

A. He did place several calls.

Q. Was there ever a point he indicated to you he wanted to make further calls and you told him this would not be possible?

A. No.

Q. You never prevented him from making additional calls?

A. No, he made quite a few calls. When being placed in the cell he stated he wanted to name some biggies, he didn't say, "I am not finished making calls."

Q. What did you say in response to that when he said he wanted to name some biggies?

A. I told him I didn't want to talk any further.

Q. Do you recall now having heard that testimony with respect to bouncing off the walls, when that happened?

A. Yes, that happened prior to his being seated at the table and prior to the search and prior to being placed in the [47] cell. The fact he was scratching constantly, I might have overdramatized the bouncing off the walls. He looked like it was driving him up the wall, scratching all over, and he did mention something about that. I don't recall what the statement was in regard to that.

Q. Did you see him walking for some time? Can you describe his walking, if you did?

A. The only walking he did was from the place in from the telephone to the guard room. It wasn't in regard to his walking that he was bouncing off the wall, more a statement of condition.

Q. Did you see him bounce off the wall once or twice?

A. No, I didn't.

Q. You did not see him bounce off the walls?

A. No, it was an expression, it was a statement of condition like, "I wanted to climb the walls," so to speak.

Q. His Honor asked you upstairs about the duration of time and I believe you said from the beginning to end about an hour or an hour and a half. Then I believe he asked from the time I think he got to the station until the time he was placed in the cell, and was your answer then 40 to 50 minutes?

A. That is right.

Q. You mentioned also about taking 20 minutes for the breathalyzer to warm up?

[48] A. Yes.

Q. What took place during that period?

A. He was just mostly seated at a table and held conversation with the desk officer, Chief Zalenski, and myself as to — he stated he was on the way home — just small talk.

Q. No interrogation?

A. No.

Q. The extent of the interrogation involved took place solely after that?

A. After introduction of the marijuana cigaret.

Q. And you simply asked after advising him, "Is there any more?"

A. Yes.

MR. FINN: That is all.

THE COURT: Well, you have given me a memorandum on this.

MR. SILVERMAN: Yes, he wouldn't have anything further to say.

THE COURT: Frankly, I glanced at it. I recognize the case you are referring to, the *Hosey* case, I am very familiar with it.

[49] MR. FINN: If I might be heard in argument, I would like to comment.

MR. SILVERMAN: I gave him the memo this morning, he probably didn't know I would come in with it.

THE COURT: Isn't there a question here of the fruit of the poisonous tree? If you assume for the sake of argument there was a knowing, intelligent waiver of Miranda, and the statement was made, that may rule out the statement made? because I recognize the statement was probably necessary to establish probable cause and get a search warrant. Does that mean the warrant is defective?

MR. SILVERMAN: I would think if the statement was made at that time, the defendant was not waiving his constitutional right to remain silent.

THE COURT: Have you got some law that says so?

MR. SILVERMAN: Well, you raise an interesting question. I don't have it at my fingertips.

THE COURT: Will you get some law?

MR. SILVERMAN: Yes.

THE COURT: Do you know of any, Mr. Finn?

MR. FINN: No, your Honor, I would argue the statement should be valid. I think the *Hosey* case is distinguishable on a large number of grounds. Despite the indication of this man certainly under the influence and apparently having some [50] effect from drugs, both officers testified he indicated that he understood what was going on and was in fact advised of his rights. There was indication further when calling his attorneys there was conversation with respect to bail. So I would say even with respect to that question —

THE COURT: Knowing, intelligent waiver the Commonwealth has the burden of proving beyond a reasonable doubt, as I understand.

MR. FINN: As I recall, the testimony was that not only was the advice given, he was asked if he understood, and I would point further to the fact —

THE COURT: There was similar evidence in *Hosey*.

MR. FINN: In *Hosey*, your Honor, in giving the statement, for example the police said they didn't know where they were going to get a lawyer at that time of night. There was an inducement in the fact of the defendant trying to get to a job. There was testimony the man was seemingly extremely emotional; a statement by an officer says he was not making much sense, determining there was something wrong with him, and they also attempted to get him to sign a waiver, a written waiver, and he indicated he couldn't read or write, and I think the fact they attempted to get him to sign all those tended to show a very different kind of circumstance than applied here, your Honor.

[51] THE COURT: Well, that is a factual issue in the case. I am not making a factual determination at this moment. I would like to hear you on the issue.

MR. FINN: I would also argue as a second prong to the argument on the basis of the search itself, even if the statements were excluded, on the basis of the evidence of the marijuana, I certainly would like the opportunity to make that argument. I take it the motion to suppress refers not only to the statement made, but what was found as a result of the search.

THE COURT: Really two-pronged. How much time do you need to submit a memorandum?

MR. SILVERMAN: Not that much time. I would say tomorrow I could. I am going to be up here, I could bring it up or mail it, whatever your Honor wishes.

THE COURT: I will leave it up to you.

MR. FINN: I would appreciate a couple of days.

THE COURT: By Thursday.

MR. SILVERMAN: Do you want us back?

THE COURT: Not necessarily, unless you wish to come back to argue. Thursday is the holiday; Friday, or better still, if you can get the memorandum filed by Wednesday, then if you wish to argue, let me know and I will arrange for you to argue later.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Exhibit No. 1.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT.

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557 As Amended.

March 28, 1975

I, Frederick D. Taliaferro, being duly sworn, depose and say:

1. I am Trooper Mass. State Police stationed at Shelburne Falls Barracks.

2. I have information based upon: On March 28, 1975 I assisted Chief Walter Zalinski Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana

cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White, stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest.

3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described — or is being concealed, etc. and may be found in the possession of _____ at premises 1969 Chevrolet 2 Dr. Hardtop, Mass registration 2M9926 VIN 136379K39207 at Shelburne Falls State Police Barracks, Massachusetts.

4. The property for which I seek the issuance of a search warrant is the following: Marijuana and any apparatus or paraphenalia [*sic*] used in the conception or preparation of controlled substances and any other controlled substances as described in section 34 of chapter 94C.

Wherefore, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of _____ and directing that if such property or evidence of any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

FREDERICK D. TALIAFERRO.

Then personally appeared the above named Frederick D. Taliaferro and made oath that the foregoing affidavit by him subscribed is true.

Before me this 28th day of March, 1975

DAMASE L. BEAUDOIN, JR.,
Assistant Clerk of the District Court.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Exhibit No. 2.

SEARCH WARRANT.

TO THE SHERIFFS OF OUR SEVERAL COUNTIES, OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR SAID COMMONWEALTH.

Proof by affidavit having been made this day before Damase L. Beaudoin, Jr. by Frederick D. Taliaferro a State Trooper of Mass. that there is probable cause for believing that certain property is unlawfully possessed or kept or concealed for an unlawful purpose.

We therefore command you in the daytime (or at any time of the day or night) to make an immediate search of a 1969 Chevrolet VIN 136379K392077 2 Door H-Top Mass. Reg. 2M9926 owned by Charles F. White of Buckland Road Ashfield and located at State Police barracks at Shelburne Falls, Mass. for the following property: marijuana and other controlled substances as defined in chapter 94C section 34 and any apparatus or paraphenalia [*sic*] used in the preparation or conception of such controlled substances and if you find any such property or any part thereof to bring it and the persons in whose possession it is found before the District Court of Franklin at Greenfield in said County and

Commonwealth, as soon as it has been served and in any event not later than seven days of issuance thereof. (Officer to make return on reverse side)

Witness, Harvey B. Kramer, Esquire, Acting Justice at Greenfield aforesaid, this 28th day of March in the year of our Lord one thousand nine hundred and seventy-five

DAMASE L. BEAUDOIN, JR.,
Assistant Clerk.

Return of Officer Serving Search Warrant.

I received this search warrant March 28, 1975, and have executed it as follows:

On March 28, 1975, at 8:30 o'clock A.M., I searched the premises described in the warrant.

The following is an inventory of the property taken pursuant to the warrant:

(9) Nine — one hundred ($100.00) Dollar Bills
(93) Ninety three — Ten Dollar Bills
(66) Sixty six — Twenty Dollar Bills
(9) Nine — Five Dollar Bills
(9) Packets (Plastic) of orange circular Tablets
100ea — 5 Bags
10ea — 3 Bags
76ea — 1 Bag (marked 80)
67 — Caps SK-E14 — color Brown end & clear end containing numerous orange & white particles contained in Plastic Bag

(2) Two — small Bags white powder in large Plastic Bag
(1) One — larger Small Bag of White Powder
(1) One — large white plastic bag Marijuana approximately 1 lbs
(1) One — large green plastic bag Marijuana approximately 1 lbs

This inventory was made in the presence of Tpr. Frederick L. Johnston.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

Tpr. FREDERICK D. TALIAFERRO #1396

Subscribed and sworn to before me this 28th day of March, 1975.

DAMASE L. BEAUDOIN, JR.,
Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Findings and Rulings in re Motion to Suppress Evidence.

In this case the defendant is charged on four indictments with possession with intent to distribute certain controlled

substances. The defendant has filed a motion to suppress all oral or written statements taken from him at the time of and following his arrest, and all evidence seized from his automobile following his arrest. A pre-trial evidentiary hearing was held on the defendant's motion. On the basis of the evidence presented at that hearing I hereby find the following facts.

On March 28, 1975 at about 2:00 o'clock A.M., Chief of Police Walter D. Zalenski of the police department of the Town of Ashfield was notified that an automobile accident had occurred on Route 116 in that town. He proceeded to the scene and found a car which had gone off the road and over an embankment, hitting several posts. The defendant was behind the wheel of the car, trying to drive it back over the embankment and onto the highway. As Chief Zalenski approached the car, the defendant asked him to help, stating that he thought that with a "push" he could "make it over the embankment."

Chief Zalenski, however, noticed that the defendant appeared to be under the influence of either drugs, alcohol, or both. His eyes appeared glassy, his speach was somewhat slurred, and there was a strong odor of alcohol on his breath. The chief accordingly ordered him from the motor vehicle, read him the Miranda warnings, and placed him under arrest. He told the defendant to follow him to his cruiser, and although the defendant staggered a bit as he did so, he was able to walk up the embankment without assistance. Chief Zalenski then called the Massachusetts State Police for assistance.

Trooper Frederick Taliaferro of the Massachusetts State Police responded to Chief Zalenski's call. When he arrived at the scene, the chief told him that the defendant was under arrest and asked him to give the defendant a breathalyzer test at the State Police Barracks. Both officers then

proceeded to the barracks in their respective cruisers. Chief Zalenski took the defendant with him in his cruiser.

When the two officers and the defendant arrived at the State Police barracks, Trooper Taliaferro read the Miranda warnings to the defendant and advised him of his right to use a telephone. He also informed him, in accordance with G.L. c. 90, § 24(1)(f), that his license to operate a motor vehicle would be suspended for 90 days if he refused to submit to a breathalyzer test. The defendant responded that he "might as well" take the test since, "I'll lose my license either way." He also attempted, however, to use a telephone in an effort to retain the services of a lawyer.

The defendant had some difficulty using the telephone. He dropped coins on the floor several times while attempting to do so. He did succeed in completing two calls, one to an attorney whom he asked to represent, but he was unable to obtain the services he sought. After a period of about 40-50 minutes, the breathalyzer test was administered by Trooper Taliaferro. The test indicated that the percentage, by weight, of alcohol in the defendant's blood was, at that time, thirteen one hundredths.[1]

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the defendant in a cell. Before doing so he searched the defendant's person and found what appeared to be a marijuana cigarette in his shirt pocket. At that time the officer told him that he would also be charged with possession of marijuana, and he again read the Miranda warnings to him. The defendant responded that he saw nothing wrong in the possession of one marijuana cigarette. The officer then asked him if he had any other marijuana on his person or in his car, and the defend-

[1]The results of the test created a statutory presumption that the defendant was under the influence of intoxicating liquor. G.L. c. 90, § 24(1)(e).

ant responded that he had more marijuana in his car. The defendant then stated that he could name some "biggies"[2], but Trooper Taliaferro told him that he did not want him to say anything further.

After the defendant was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application. The affidavit read, in material part, as follows:

> "On March 28, 1975 I assisted Chief Walter Zalenski [sic] Ashfield PD with a subject under arrest for operating under the influence. I gave the defendant, Charles F. White his miranda rights. [sic]. I than [sic] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [sic]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant for a search of the defendant's motor vehicle was issued on the basis of the application and the supporting affidavit. Upon a search of the vehicle a substantial quantity of various controlled substances plus $3,195.00 in cash[3] was discovered in the vehicle's trunk. That property was seized and is, together with the defendant's oral statements to Trooper Taliaferro, the subject of the motion to suppress evidence.

1. I am unable to find that the Commonwealth has met its "heavy burden" of demonstrating that this defendant

[2]The defendant was apparently referring to certain drug dealers whom he was willing to identify in exchange for leniency.

[3]The cash was found in a strong box which was found in the trunk.

had knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel at the time when he supplied Trooper Taliaferro with the incriminating information with regard to the presence of controlled substances in his motor vehicle. In the first place, he had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance. Although his attempts were unsuccessful (not surprising in view of the hour), he at no time indicated that he intended to abandon his efforts or that he had changed his mind with regard to that objective. Furthermore, it is apparent from Trooper Taliaferro's reaction that the officer did not regard the defendant as having waived his right to silence or his right to counsel. When the defendant offered to reveal the identity of certain alleged "biggies," the officer declined to question him further. That declination was made, I believe, in deference to the defendant's constitutional rights. Finally, the defendant was clearly under the influence of intoxicating liquor at the time when he made the inculpatory statement. Trooper Taliaferro described him as "bouncing off the walls," and the breathalyzer reading was sufficiently high to create a statutory presumption of intoxication. The Supreme Judicial Court has made it clear that when a suspect has been brought in on a charge of drunkenness, the police should not proceed with questioning on the basis of a waiver of *Miranda* rights until the suspect is "clearly capable of responding intelligently." (*Commonwealth* v. *Hosey*, 1975 A.S. 2732, ____ N.E. 2d ____). The same rule must apply when the suspect has been brought in on a charge of driving under the influence of either liquor or narcotic drugs. In this case that test had

not been met when the defendant made his inculpatory statements. It follows that those statements must be suppressed as evidence at his trial.

2. A different issue, however, is presented by the motion insofar as it seeks suppression of the narcotic drugs and currency which were discovered in the trunk of the defendant's car. That property was discovered and seized in the course of a search that was authorized by a warrant issued by a duly-authorized magistrate. The affidavit that provided the basis for the issuance of that warrant clearly, I think, established probable cause to believe that the automobile which was the subject of the search contained contraband which was subject to such seizure. The existence of such probable cause, however, unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband — and that statement was obtained in violation of the defendant's Miranda rights. The question, I therefore suppose, is whether the results of the search must also be suppressed as "fruits of the poisonous tree." I do not think so.

In the first place, I am aware of no decision, binding upon me, in which it has been held that a statement obtained in violation of a suspect's *Miranda* rights may not be used to establish probable cause for the issuance of an otherwise valid search warrant. The industry of counsel on both sides of this particular issue has been unable to disclose a decision on that precise point. I am, of course, aware of the decision of the Supreme Court of the United States in *Wong Sun* v. *United States*, 371 U.S. 471, but that case involved the reverse of the situation with which I am now faced. In *Wong Sun*, the product of a clearly illegal arrest and search was an inculpatory admission by the defendant. The same was true in the more recent case of *Brown* v.

Illinois, ____ U.S. ____, 45 L. Ed. 2d 416, 95 S. Ct. ____ (June 26, 1975). In this case, a statement by the defendant (obtained in violation of *Miranda*) provided the probable cause for the issuance of an otherwise valid warrant.

The holding of the Supreme Court in *Miranda* (*Miranda* v. *Arizona*, 384 U.S. 434, 86 S. Ct. 1602, 16 L. Ed. 2d 694) did not expressly preclude the use of statements obtained without a knowing, intelligent and voluntary waiver of the prescribed warnings as a basis for probable cause for the issuance of a valid warrant. In that case the court promulgated a set of safeguards to protect the delineated constitutional rights of persons subjected to custodial police interrogation and held that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him *as a defendant at trial*, even though the statement may in fact be wholly voluntary. *Michigan* v. *Mosely*, ____ U.S. ____, 96 S. Ct. 321 (December 9, 1975). The court did not discuss the possibility that such statements could not be used for other purposes. I do not, however, regard that distinction as controlling. The basic purpose of the *Miranda* holding is to protect the individual's Fifth Amendment privilege against compelled testimonial self-incrimination unless the privilege is "knowingly and intelligently" waived, in recognition of the fact that custody creates an inherent compulsion on an individual to incriminate himself in response to questions. A statement which provides probable cause for a subsequent search of a suspect's home or motor vehicle is, when the search results in the discovery and seizure of incriminating evidence, a self-incriminating statement in any real sense. I assume that there might be cases in which

the interests of the integrity of the judicial process would require suppression, not only of the statement, but also of the fruits of the subsequent search. I do not believe, however, that this is such a case.

The exclusionary rule that precludes the admission in evidence of illegally obtained evidence is designed to deter police from violating the constitutional rights of persons suspected of crime. Thus, an involuntary statement coerced from a defendant may not be used as evidence against him, no matter how accurate the contents of the statement may prove to be. The *Miranda* holding extends that principle to exclude even voluntary statements of a suspect in custody, unless that suspect has been given the specified warnings and has waived his right to silence and to the assistance of counsel. I do not believe, however, that the prophylactic approach of *Miranda* must or should be extended to exclude evidence obtained as an indirect result of a suspect's in-custody statement, where there has been no purposeful attempt to subvert the defendant's rights. Compare *Brown* v. *Illinois, supra*.

The Supreme Court of the United States has stated in *Nardone* v. *United States*, 308 U.S. 338, 84 L. Ed. 307, 60 S. Ct. 266:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

That language was recently quoted with approval in *Brown* v. *Illinois, supra*.

The court has also said,

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings." *United States* v. *Callandra*, 414 U.S. 338, 348.

And, more to the point in my opinion:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent conduct which has deprived the defendant of his rights. Where the officer's conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447.

In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*. The defendant's rights were read to him on no less than three occasions, and the officers made no attempt whatever to interrogate him with regard to the crime for which he was initially arrested. The only interrogation of the defendant consisted of a single question which was put to him after the marijuana cigarette was discovered in his shirt pocket, and after he had been read the warnings for the third time. Furthermore, that question was in response to an unsolicited statement by the defendant to the effect that he did not regard possession of the single cigarette as a crime. It is noteworthy, I think, that Trooper Taliaferro refused to extend the conversation,

although the defendant offered to volunteer further information which might well have led to further self-incrimination. I am satisfied that Trooper Talliaferro asked the single question as a natural consequence of the immediately preceding events, and without any conscious intent to deny the defendant his right to silence or his right to the assistance of counsel.

Although I am unable to find that the defendant had "knowingly and intelligently" waived his right to silence or to the assistance of counsel when he stated that more marijuana could be found in his vehicle, it is clear that no actual coercion, other than that inherent in his in-custody status, was applied by the police to obtain that information. As noted above, the information was given in response to a single question and in the course of a short conversation initiated by the defendant himself. Under these circumstances, I do not believe that exclusion of the evidence seized from the defendant's vehicle would serve as a deterrent to future police misconduct, for there was no conscious police misconduct in this case. Exclusion of this evidence could only serve to defeat the ends of justice with no corresponding benefit to the integrity of our judicial system. I do not believe that *Miranda* should or will be stretched that far.

Accordingly, it is ordered

(1) That the motion to suppress evidence, insofar as it related to any oral statements made by the defendant while in custody, is allowed.

(2) That the motion to suppress evidence insofar as it relates to the property seized from the defendant's motor vehicle in the execution of the search warrant, is denied.

JOHN F. MORIARTY,
Justice of the Superior Court.

Entered: January 29, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Exception.

Now comes the defendant, CHARLES F. WHITE, and claims an exception to the "FINDINGS AND RULINGS IN RE MOTION TO SUPPRESS EVIDENCE" entered by the Court on January 29, 1976.

DEFENDANT,
By STEPHEN W. SILVERMAN.

Filed February 4, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Claim of Appeal.

Now comes the defendant, CHARLES F. WHITE, and pursuant to Mass. General Laws, Chapter 278, Section 33B,

being aggrieved by the opinions, rulings, directions and judgment of the Superior Court rendered upon questions of law arising out of the above-captioned cases, claims an appeal.

CHARLES F. WHITE, DEFENDANT,
By STEPHEN W. SILVERMAN.

Filed June 9, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Assignment of Error.

Now comes the defendant and makes the following assignment of error:

1. The Superior Court judge erred in denying in part the defendant's "Motion to Suppress Evidence". The evidence was obtained as a result of violations of the defendant's rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States and should have

been suppressed as "fruits of the poisonous tree". Exception filed on February 4, 1976 (Docket #7)

Respectfully submitted,
By his attorney,
ROBERT S. COHEN.

Filed November 26, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

COMMONWEALTH *vs.* CHARLES F. WHITE.

Franklin. May 5, 1977. — December 30, 1977.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & LIACOS, JJ.

Search and Seizure. Probable Cause. Constitutional Law, Search and seizure, Probable cause, Waiver of constitutional rights. *Practice, Criminal,* Suppression of evidence. *Waiver.*

INDICTMENTS found and returned in the Superior Court on September 9, 1975.

A pre-trial motion to suppress evidence was heard by *Moriarty*, J., and the cases were heard by *Cross*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Robert S. Cohen for the defendant.

John M. Finn, Assistant District Attorney (*Stephen R. Kaplan*, Assistant District Attorney, with him) for the Commonwealth.

LIACOS, J. In a jury waived trial held pursuant to the provisions of G. L. c. 278, §§ 33A-33G, the defendant was found guilty on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana (Class D); cocaine (Class B); amphetamines (Class B); and LSD (Class C). G. L. c. 94C, § 31. He was sentenced to not more than seven nor less than five years at the Massachusetts Correctional Institution at Walpole as to three of the convictions, the sentences to run concurrently. The marihuana conviction was filed. The defendant appealed to the Appeals Court and we transferred the case here on our motion. We reverse the convictions.

The only point we need consider on this appeal is whether the trial judge was correct in denying the defendant's motion

to suppress evidence of controlled substances, related paraphernalia, and the contents of a strongbox ($3,195) found in a search of the trunk of the defendant's car. The search was pursuant to a search warrant, the affidavit in support of which was based on statements which the judge held should be suppressed as they were obtained in violation of the commands of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The underlying facts found after a hearing on the defendant's motion are set forth in the judge's findings and rulings on the matter. We state the facts, as embodied therein, necessary for our decision.

At approximately 2 A.M., on March 28, 1975, the chief of police of the town of Ashfield responded to a report of a motor vehicle accident. The defendant's automobile had apparently gone off the road over an embankment, hitting several posts. The chief of police found the defendant in his vehicle alone trying to get his car back on the road. The defendant's behavior and appearance gave the chief reason to believe that the defendant was operating under the influence of drugs or alcohol, or both, whereupon he ordered the defendant out of the car, placed him under arrest for operating under the influence, and gave him the warnings required by *Miranda* v. *Arizona*, *supra*. At this point, he ordered the defendant to walk up to the police cruiser, a task the defendant accomplished without assistance, but with some degree of staggering.

Responding to a call for assistance from the chief of police, an officer of the State police met him at the accident scene. After arranging to have the defendant's car towed to the State police barracks at Shelburne Falls, he returned to the barracks. The chief of police had transported the defendant to the same State police barracks for the purpose of having a breathalyzer test administered to the defendant. When the trooper arrived at the barracks, he read the defendant his

Miranda rights. He advised the defendant of his right to a breathalyzer test and of the consequences of his refusal to submit to the same, G. L. c. 90, § 24 (1) (*f*), of his right to a blood test by a physician of his own choice, and of his right to make a telephone call. The defendant agreed to submit to the breathalyzer test.

Prior to the administration of the test, the defendant attempted to retain the services of an attorney through the use of a coin operated telephone. In the course of the attempts to reach an attorney the defendant experienced some difficulty, dropping coins on the floor several times. There was evidence from the trooper that the defendant "bounce[d] around," "climb[ed] the walls," was scratching himself in an unusual way, and "didn't know what he was doing." After these attempts to reach an attorney were unsuccessful, the defendant took the test, the results of which were sufficient to invoke the statutory presumption that the defendant was driving under the influence of intoxicating liquor. G. L. c. 90, § 24 (l) (*e*).

At this point, the trooper prepared to place the defendant in a holding cell. Before doing so, the trooper searched the defendant's person and discovered what appeared to be a marihuana cigarette in the defendant's shirt pocket. The trooper then informed the defendant that he would also be charged with possession of marihuana. He gave the defendant his Miranda warnings once more. The defendant responded that he saw nothing wrong with the possession of one marihuana cigarette. The trooper then asked the defendant if he had any other marihuana on his person or in his car, and the defendant replied that he had some marihuana in his car. The defendant also stated that he could name some "biggies," to which the trooper replied that he did not wish to inquire any further.

Armed with the information gained from the defendant's statements, the trooper prepared an application for a search

warrant to search the defendant's vehicle, by then located at the State police barracks. The affidavit stated in material part: "On March 28, 1975 I assisted Chief Walter Zalenski [*sic*] Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White, stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant was issued on the basis of the affidavit. A search of the trunk of the vehicle pursuant thereto resulted in the discovery of a substantial quantity of controlled substances, related paraphernalia, such as glassine bags and cigarette wrappers and a strongbox containing a substantial amount of cash. It was this property as well as the defendant's statements that was the subject of the defendant's suppression motion.

The judge concluded that the defendant's statements must be suppressed as the Commonwealth had not met its heavy burden of demonstrating that the defendant had knowingly or intelligently waived his right to counsel or his privilege against self-incrimination. Relying primarily on *Commonwealth* v. *Hosey*, 368 Mass. (1975) [Mass. Adv. Sh. (1975) 2732], he reasoned that the defendant's condition precluded him from making an effective waiver. Despite this ruling, however, he declined to order the suppression of the physical objects, including the controlled substances seized in the defendant's car. The judge reasoned that the defendant's statements could be used in support of the application for the search warrant since he did not believe the policies behind the exclusionary rule would be furthered by its application in this context. He found that the officers were scrupulous in observing the de-

fendant's rights and that the statement as to the location of the controlled substances in the vehicle did not come about as a result of police subterfuge or any purposeful attempt to subvert the defendant's rights.

The essence of the defendant's arguments here may be summarized as follows: (a) the judge correctly ordered the suppression of the defendant's inculpatory statements; (b) the judge correctly ruled that without the defendant's statements the application for the warrant failed to establish probable cause; and (c) since the warrant was invalid, the search of the car was illegal and the objects seized therein should have been suppressed. The Commonwealth's answer to these claims is that (a) the judge was wrong in ordering suppression of the defendant's statements; (b) the affidavit in support of the search warrant, even without such statements, demonstrates probable cause (contrary to the judge's ruling); and (c) if the warrant is ruled invalid, the search is still valid as a warrantless car search or, alternatively, as an inventory search of an impounded vehicle. We turn first to the threshold issue of the propriety of the suppression of the defendant's statements, and the effect thereof.

1. The Commonwealth appears to urge that we reexamine the factual determination of the judge relative to the suppression of the defendant's statements. The claim is that the judge erroneously found that the defendant did not intelligently and voluntarily waive his rights under *Miranda*. It has sought to distinguish *Commonwealth* v. *Hosey*, *supra*, relied on by the judge below, in numerous ways and point to our recent decision in *Commonwealth* v. *Fielding*, Mass. (1976) [Mass. Adv. Sh. (1976) 2290], as limiting the *Hosey* case to extreme circumstances of loss of cognitive ability.

It is well established that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), quoting

from *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). Thus, when inculpatory statements are made by a defendant in a situation like that presented in the instant case, "a heavy burden rests on the [prosecution] to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, *supra* at 475. *Commonwealth* v. *Cain*, 361 Mass. 224, 228 (1972).

The Commonwealth's argument founders on the well established principle of appellate review that where, as here, subsidiary findings of fact have been made by a trial judge, they will be accepted by this court absent clear error. *Commonwealth* v. *Hosey*, *supra*. See *Commonwealth* v. *Murphy*, 362 Mass. 542 (1972). Such findings as to intelligent and voluntary waiver, or the absence thereof, are entitled to substantial deference by this court. *Commonwealth* v. *Roy*, 2 Mass. App. Ct. 14, 19 (1974). Having heard the evidence, the judge specifically found that the defendant had "affirmatively demonstrated a desire for the assistance of counsel" and had "at no time indicated . . . he had changed his mind" in that regard. The judge also found that the State trooper did not regard the defendant as having waived his right to silence or his right to counsel. On those facts alone it would be a difficult task for the Commonwealth to establish that the defendant had waived his right to counsel. *Brewer* v. *Williams*, 430 U.S. 387 (1977). If one considers, as did the judge, the evidence of the defendant's being under the influence, established through the breathalyzer test, and his behavior, it is clear that the more prudent and constitutionally preferable course would have been for the police to withhold any further questioning "until [the defendant] was clearly capable of responding intelligently." *Commonwealth* v. *Hosey*, *supra* at [Mass. Adv. Sh. (1975) at 2743]. While the case before us is not so compelling as was the situation in *Hosey*, we cannot

conclude that the judge erred in finding that the Commonwealth's heavy burden had not been satisfied.

2. It follows that we must then consider whether such statements, despite their inadmissability at trial, could be used for the purpose of establishing probable cause sufficient to obtain a valid search warrant. Unlike the trial judge, we conclude that they may not.

In *Commonwealth* v. *Hall*, 366 Mass. 790, 795 (1975), we recognized that evidence obtained in violation of constitutional guaranties against illegal search and seizure may not be considered in determining whether there was probable cause to obtain a warrant. More recently, in *Commonwealth* v. *Haas*, Mass. (1977) [Mass. Adv. Sh. (1977) 2212], we held that evidence obtained in violation of the principles laid down in *Miranda* v. *Arizona*, *supra*, may not be considered in determining whether there is probable cause to make an arrest and thus validate a search made incident to the arrest.

From these cases it follows that neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would, in effect, sanction the initial violations of constitutional guaranties which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called "fruit of the poisonous tree" doctrine set forth in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), and *Nardone* v. *United States*, 308 U.S. 338 (1939). Although this exact issue has not been determined by the Supreme Court, but cf. *Michigan* v. *Tucker*, 417 U.S. 433 (1974), we believe that *Haas* controls the issue in this Commonwealth. The policies underlying the "fruits" doctrine in the search and seizure area are even more compelling in the instant case. Evidence obtained in violation of the guaranty against unreasonable searches and seizures is more often than not reliable, probative evidence. *Schneckloth* v.

Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). While evidence obtained in violation of the Miranda guidelines may be similarly probative and reliable, there is a far more significant danger that it will not be so. *Miranda* v. *Arizona*, *supra* at 447, 455 & n. 24.

3. The judge ruled that the existence of probable cause to support the search warrant "unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband." We agree. It does not appear that the warrant, considered without the tainted evidence, is sufficient to establish probable cause. Cf. *Commonwealth* v. *Hall*, *supra*. Without the defendant's admission, the only evidence for the magistrate to consider was the allegation that the defendant was under arrest for driving under the influence and the marihuana cigarette was that found in his shirt pocket.

The lowest threshold of probable cause which we have previously accepted in a case of this kind was in *Commonwealth* v. *Miller*, 366 Mass. 387 (1974). In that case the facts were that the defendant was found with a small quantity of marihuana and uttered words which arguably indicated a consciousness of criminal conduct. A majority of the court found these facts sufficient to establish probable cause over the dissent of three Justices. In this case even less is present. Neither the possession of the small quantity of marihuana nor the fact that the defendant was thought to be operating under the influence of alcohol sufficiently establishes a nexus between the criminal activity sought to be investigated and the trunk of the vehicle. There is no necessary correlation between the untainted allegations in the affidavit and the presence of controlled substances in the defendant's car. At best, issuance of a warrant on such information alone would be a "hunch" on the part of the issuing magistrate, *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting), a level of

information not on a par with that required by the Constitution. This much was recognized by the judge and we see no reason to disagree.

4. This does not end our inquiry however. We indicated in *Commonwealth* v. *Blackburn*, 354 Mass. 200, 203 (1968), that a police officer should not be penalized for obtaining a search warrant, later ruled invalid, when there were adequate grounds to conduct a warrantless search. See *United States* v. *Darrow*, 499 F.2d 64, 68 (7th Cir. 1974). We consider whether the search here could be vindicated as a valid warrantless search.

In this case, no evidence was presented at the hearing on the motion which would justify this court in upholding the search as an inventory search, *South Dakota* v. *Opperman*, 428 U.S. 364 (1976);[1] *Cady* v. *Dombrowski*, 413 U.S. 433 (1973) (evidence of regular practice) or as the automobile equivalent of a "stop and frisk" search, *Commonwealth* v. *Almeida*, Mass. (1977) [Mass. Adv. Sh. (1977) 1799]. Nor can it be justified as a search incident to arrest. See *Chimel* v. *California*, 395 U.S. 752 (1969). Thus the search, if it is to be sustained at all, must be upheld as a permissible warrantless search of an automobile made on the basis of probable cause.

While the law concerning the proper parameters of warrantless automobile searches continues to be an area of vexing inconsistency and illogic, see *Commonwealth* v. *Haefeli*, 361 Mass. 271, 278 (1972), we have adhered to the view expressed in *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970), that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable

[1] We intimate no opinion as to whether we would choose to follow the rule in *Opperman*, since it is not applicable to the facts here. See *State* v. *Opperman*, S.D. (1976) (247 N.W.2d 673 [1976]).

cause to search, either course is reasonable under the Fourth Amendment." See *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting). *Chambers* also allows such searches based on probable cause to be conducted at the station house as opposed to requiring that they be made at the scene where the police initially encounter the motor vehicle. However, we have understood *Chambers* read in conjunction with *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), to require that the determination as to probable cause must be made at the time the automobile is first stopped, rather than on facts as may become available at a later time. *Commonwealth* v. *Rand*, 363 Mass. 554, 559 (1973). In this case, the facts available at the time of the first encounter would allow the officer to conclude that the defendant was driving under the influence of alcohol. Anything else was found at a point in time beyond that which we may permissibly consider under *Chambers* and *Coolidge*. *Commonwealth* v. *Rand*, *supra*. See, *United States* v. *Edwards*, 415 U.S. 800 (1974).

We do not believe that the mere fact that a person is apprehended for driving under the influence of an intoxicant is, without more, sufficient to allow a prudent man to conclude that a crime requiring a search of the automobile, its trunk, and the interior of a strongbox located therein has been committed. *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting). Cf. *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972). See *United States* v. *Chadwick*, U.S. (1977) [97 S. Ct. 2476 (1977). It therefore follows that a warrantless search cannot be considered permissible in these circumstances and that the judgments of the court below must be reversed.

Judgments reversed.
Findings set aside.